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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/694,960

10/28/2003

Isabelle Laye

1410/79708

4443

22242 7590 02/27/2009
FITCH EVEN TABIN AND FLANNERY
120 SOUTH LASALLE STREET
SUITE 1600
CHICAGO, IL 60603-3406

EXAMINER

WONG, LESLIE A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

02/27/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/694,960	Applicant(s) LAYE ET AL.	
	Examiner Leslie Wong	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 27-42 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 and 27-42 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12/2/2008</u> . | 6) <input type="checkbox"/> Other: _____ |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7 and 27-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta et al (Lait (1993) **73**, 381-388) for the reasons set forth in rejecting the claims in the last Office action.

Gupta et al disclose a cheese comprising the addition of whey protein concentrate and an emulsifier, wherein the emulsifier serves to improve the firmness (see entire document, especially Figure 1). It is further noted that the addition of whey protein concentrate to cheese serves to increase the whey in the casein-to-whey ratio.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to adjust the whey to casein ratio as taught by Gupta et al and as is claimed because the manipulation of the casein to whey ratio is well-known in the art. In the absence of a showing to the contrary Applicant is using known components to obtain no more than expected results.

Claims 1-7 and 27-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yee et al (US Patent No. 5750177) for the reasons set forth in rejecting the claims in the last office action.

Yee et al disclose a cheese containing added whey having a melting temperature of less than 200°F (see entire document, especially claims 10 and 12). Although not the

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preferred embodiment, Yee discloses emulsifying agents (see column 4, lines 46-51 and column 7, lines 16-26).

The claims differ as to the specific ratio of casein to whey.

Yee et al also teach the adjustment of the casein to whey ratio and specifically teach a ratio of at least 1:4 (whey to casein).

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to adjust the whey to casein ratio as taught by Yee et al and as is claimed because the manipulation of the casein to whey ratio is well-known in the art. In the absence of a showing to the contrary Applicant is using known components to obtain no more than expected results.

Yee et al clearly teach the adjustment of the whey to casein ratio (including 1:16, 1:8, and 1:4) and Yee et al specifically teach making a cheese with a higher level of whey proteins than in conventional cheese (see column 5, lines 14-45).

Applicant's arguments filed December 2, 2008 have been fully considered but they are not persuasive.

Applicant argues that Gupta et al and Yee et al do not teach the claimed whey to casein ratio in combination with the claimed melting point, and that the claimed ratios provide for unexpected results.

The rejection is applied under 35 U.S.C. 103(a). As stated above, the claims differ from Yee et al and Gupta et al as to the specific ratio of casein to whey. Yee et al teach the adjustment of whey to casein ratio and a cheese with a higher level of whey

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proteins than in conventional cheese. Gupta et al teach a cheese comprising the addition of whey protein concentrate and an emulsifier, wherein the addition of whey protein concentrate to cheese serves to increase the whey in the casein-to-whey ratio. In response to applicant's argument that there is no suggestion to modify the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. In this case, Yee et al and Gupta et al teach a modification of the protein ratios. In the absence of a showing of unexpected results, applicant is using known components to obtain no more than expected results.

The declarations under 37 CFR 1.132 filed December 2, 2008 is insufficient to overcome the rejection of claims 1-7 and 27-42 based upon Yee et al and Gupta et al as set forth in the last Office action for the following reasons.

For the Laye et al declaration:

The showing is not commensurate in scope with the broadest claim (i.e. claim 1). It appears that melting points from the specification include the presence of an emulsifier yet claim 1 does not require the presence of an emulsifier.

For the Fu-I Mei declaration:

The showing does not specifically compare the claimed invention to that of the prior art. The showing is not commensurate in scope with the broadest claim. Section

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24, Table 6 teaches a decrease in measured height at 100 to 102°C for all samples which signifies melting yet Table 8 teaches no melting at greater than 100°C. Applicant does not explain these differences.

Yee et al and Gupta et al teach a modification of the protein ratios as is claimed. In the absence of a showing of unexpected results, applicant is using known components to obtain no more than expected results.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is (571)272-1411. The examiner can normally be reached on Tuesday to Friday.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leslie Wong/
Primary Examiner, Art Unit 1794

LAW
February 25, 2009